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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1995

DEXTER D. COFFIN, III,

Petitioner,

V.

COMMONWEALTH OF VIRGINIA,

Respondent.

Petition for Writ of Certiorari to the Court of Appeals of Virginia

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Is it a violation of Due Process for a prosecutor to participate in the prosecution of an individual he previously assisted as appointed counsel in the context of the same criminal case?

2. Does a criminal defendant have a right to be heard in court following a probation violation hearing where he then first learns of the existence of exculpatory evidence possessed by a state administrative agency at the time he tendered an Alford plea to the indictment underlying his conviction?

3. Is a criminal defendant entitled to specific performance of a plea agreement where a plea tendered was subject to the Prosecutor's promise to insure that revocation of the defendant's probation in an earlier matter would not occur?

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CITATION OF REPORTS

The decision of the Court of Appeals of Virginia was not reported. The Order of the Supreme Court of Virginia refusing the petitioner's subsequent petition for appeal was also not reported.

JURISDICTION

The judgment of the Court of Appeals of Virginia was entered on September 7, 1994. The Order refusing the petitioner's subsequent petition for appeal to the Supreme Court of Virginia was entered on September 22, 1995. On October 24, 1995 the Supreme Court of Virginia entered an Order deferring issuance of its mandate to December 21, 1995 pending the timely docketing of the instant petition.

The jurisdiction of this Court to review the judgment of the Court of Appeals of Virginia is invoked under Title 28, United States Code, Section 1257(3).

CONSTITUTIONAL AMENDMENTS INVOLVED

Amendment V.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb, nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment VI.

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

Amendment XIV.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and the state wherein they reside. No state shall make or enforce any law which shall

abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

IN THE SUPREME COURT OF
THE UNITED STATES

October Term, 1995

DEXTER D. COFFIN, III, Petitioner

v.

COMMONWEALTH OF VIRGINIA, Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF VIRGINIA

The petitioner Dexter D. Coffin, III respectfully prays that a writ of certiorari issue to review the judgment of the Court of Appeals of Virginia, entered in the above-entitled proceeding on September 7, 1994. A timely petition for appeal to the Supreme Court of Virginia was refused on September 22, 1995.

DECISIONS BELOW

The decision of the Court of Appeals of Virginia was not reported. Together with the Order of the Supreme Court of Virginia refusing Mr. Coffin's Petition For Appeal, the decision of the Court of Appeals of Virginia is reprinted in the Appendix hereto. The mandate of the Supreme Court of Virginia was ordered deferred on October 24, 1995 pending the timely docketing of this petition.

STATEMENT OF THE CASE

On July 25, 1984 Albemarle County, Virginia police alleged that Your Petitioner, Dexter D. Coffin, III (hereinafter Mr. Coffin), altered a prescription for a controlled substance which had been issued to him by Dr. Hilbert Delawter in violation of Section 18.2-258.1(A)(ii), Code of Virginia (1984), the gravamen of which was that Mr. Coffin allegedly enlarged the quantity of tablets to be dispensed for which the prescription was issued from 14 to 44.

The case was called up for a preliminary hearing before the General District Court of Albemarle County on October 29, 1985. When Mr. Coffin appeared without counsel, the court appointed "Mr. James Camblos of the Charlottesville/ Albemarle Bar to assist Mr. Coffin in this trial." The transcript of the trial reflects that the court afforded Messrs. Camblos and Coffin multiple opportunities to confer at various times throughout the course of the proceedings, albeit Mr. Coffin conducted his own defense.

Called to testify by the Commonwealth was Dr. Hilbert Delawter, Mr. Coffin's physician. Under cross-examination Dr. Delawter admitted that he did not recall writing or handing the prescription in issue to Mr. Coffin. Indeed, the crux of the Commonwealth's case turned entirely on records Dr. Delawter claimed to have maintained which, he said, reflected that he had never recorded altering the quantity of tablets to be dispensed on the prescription. However, the number "44" did appear on records Dr. Delawter brought to the trial, but Dr. Delawter opined that

since the number appeared in parenthesis it indicated that such was the quantity reported by the pharmacist to appear on the prescription at the time it was filled.

Mr. Coffin presented no evidence, but argued that the Commonwealth failed to meet its burden of proof. Nevertheless, the Court certified the case to a Grand Jury for purposes of indictment.

Following his indictment and upon the advice of retained counsel Colin Guy, Mr. Coffin tendered a plea in accordance with North Carolina v. Alford, 400 U.S. 25 (1970), relative to the Grand Jury's indictment to the Circuit Court of Albemarle County. On July 9, 1986 Mr. Coffin was sentenced to three years in the state penitentiary, the execution of which was suspended, inter alia, upon Mr. Coffin serving a term of five years on supervised probation following his release from the Virginia Department of Corrections to which he had been committed by another court.

Not disclosed to Mr. Coffin or any of his attorneys during the course of the foregoing proceedings was the fact that Dr. Delawter was the subject of an administrative investigation by the Virginia Board of Medicine. Indeed, years would pass before Mr. Coffin would learn that the Virginia Board of Medicine had placed Dr. Delawter's license to practice medicine on indefinite probation citing his "personal drug use" and his "failure to maintain accurate records."

Mr. Coffin was released from confinement and commenced serving the probation term imposed by the Circuit Court of Albemarle County on August 4, 1989.

On May 7, 1993 a show-cause order relative to an allegation that Mr. Coffin violated a condition of his probation was entered by the Circuit Court of Albemarle County and served on James E. Treakle, Jr., counsel for Mr. Coffin. The order, records reflect, was requested by Albemarle County Commonwealth's Attorney James Camblos - the same attorney appointed to assist Mr. Coffin before the General District Court on October 29, 1985.

The probation violation hearing was held on November 3, 1993 during the course of which Mr. Camblos supervised his Deputy, J. Ford Childress, who conducted the Commonwealth's case. The evidence presented by Messrs. Camblos and Childress revealed that Mr. Coffin tendered an Alford plea in an unrelated matter on April 5, 1993. The uncontradicted evidence Mr. Coffin deduced, however, that part of the agreement relative to the plea negotiated between Mr. Coffin's counsel and the Richmond Special Prosecutor specifically provided that Mr. Coffin would suffer no adverse consequences relative to his Albemarle County probation in consideration for the disposition of the April, 1993 criminal matter. Nevertheless, Mr. Coffin was found to have violated a condition of his probation and the three year term, suspended on July 9, 1986, was activated. Mr. Coffin was released on bond pending appeal.

Within 21 days of the trial court's judgment revoking Mr. Coffin's probation Mr. Coffin learned that Mr. Camblos was now the Albemarle County Commonwealth's Attorney; attorney Treakle learned that Mr. Camblos was appointed to assist Mr. Coffin before the General District Court on October 29, 1985; and, Messrs. Treakle and Coffin first learned that Dr. Delawter had been placed on administrative probation by the Virginia Board of Medicine upon its finding, inter alia, that he "failed to maintain accurate records."

Consequently, Mr. Treakle perfected appropriately-supported motions both for reconsideration and to vacate the trial court's judgment predicated on both issues pursuant to the authority of Rule(s) 1:1 and 3A:15(b), Rules of Supreme Court of Virginia. Without affording a hearing on either motion on November 23, 1993 the trial court summarily denied them. Mr. Camblos filed a document entitled "Commonwealth's Statement for the Record" wherein he attempted to minimize his involvement with Mr. Coffin during the October 29, 1985 hearing and erroneously claimed to have "had nothing to do with the request for show cause filed." Mr. Treakle thence filed an Objection with the trial court noting, in part, that Mr. Coffin had "not been given the opportunity to respond to the allegations in said Document under oath." Despite the objection of counsel, the Commonwealth's "proffer" became a part of the record on appeal.

Throughout the direct review proceedings before the state courts, the Commonwealth was represented by James Camblos personally, who, again,

was the attorney who assisted Mr. Coffin by court appointment in the only trial ever held relative to the 1984 criminal allegation.

On September 7, 1994 the Court of Appeals of Virginia denied Mr. Coffin's petition for appeal. The Court refused to consider the issue of Mr. Camblos' involvement in the course of Mr. Coffin's probation violation proceedings upon the basis that Mr. Coffin had failed to object to Mr. Camblos' presence in the courtroom. Citing Rule 5A:18, Rules of Supreme Court of Virginia, and case authority, the Court of Appeals of Virginia concluded that this ground for relief was subject to the contemporaneous objection rule and that the failure to make a "timely objection" constituted a waiver of the claim.

With regard to Mr. Coffin's claim respecting the Virginia Board of Medicine's action against Dr. Delawter and the exculpatory nature of this action in relation to Mr. Coffin's conviction the Court held that, since Mr. Coffin had otherwise entered a voluntary and intelligent plea of guilty, he had waived all non-jurisdictional defenses and the judgment would not be vacated.

In addressing Mr. Coffin's claim regarding a prosecutorial promise to insure that a plea to a subsequent indictment would not adversely affect Mr. Coffin's Albemarle County probation, the Court of Appeals of Virginia concluded that there was no record evidence of such a promise. As stated, a subsequent petition for appeal to the state Supreme Court was refused.

REASONS FOR GRANTING THE WRIT

I.

It is a violation of due process if (a) a prosecutor actively participates in a criminal matter in which he previously assisted the accused as court-appointed advisor, and (b) the decision of the Court of Appeals of Virginia conflicts with established precedent of the federal Courts of Appeal.

Fundamental fairness, due process and, indeed, the concept of justice itself dictates that there can be no qualitative difference in the obligation of loyalty which an attorney owes his client whether the relationship between them emanates from direct employment, court appointment for the purpose of representation or, as here, court appointment to assist an accused who has invoked his right of self-representation. Commensurate with the goal of confidence and integrity in our judicial system is the necessity of the survival of this obligation beyond the termination of the phase of the case in which counsel was involved. The assumption of finality in litigation cannot ever lend itself to the notion that counsel is then free to pursue objectives which are contrary to those of his client in the context of the matter for which counsel was employed or appointed. As this Court has noted, the ultimate goal is, "the ability of the adversarial system to produce just results", Strickland v. Washington, 466 U.S. 668, 685 (1984), and, consequently, the "focus of inquiry must be on the fundamental fairness of the proceeding

whose result is being challenged." Id., 466 U.S., at 696. Where counsel switches sides, regardless of the stage in which counsel's role has altered, that goal is undermined and, with it, confidence in the outcome of the proceeding.

Conversely, Mr. Coffin does not suggest that the attorney-client relationship created by counsel's appointment forever precludes counsel from a role of advocacy which is contrary to the objectives of his former client in a future, though unrelated, matter. Certainly counsel is free to seek such other employment or, as here, political objectives as he may desire without regard to his prior involvement with his former client. A genuine conflict does arise, however, when counsel and his former client find themselves immersed in subsequent adversarial proceedings involving the very matter for which counsel accepted the earlier appointment. The imperative question here presented is the role counsel should then assume and what response, if any, a trial court is obliged to take when the relationship of the two is brought to its attention.

The federal appellate courts have been particularly cautious where even potential for such conflicts of interest have appeared to exist. For instance, in United States ex rel. Duncan v. O'Leary, 806 F.2d 1307 (7th Cir. 1986), cert. denied, 107 S.Ct. 1982 (1987), the Court concluded that a conflict arose when defense counsel became the prosecuting attorney's campaign manager for an impending election and actually conferred with the prosecutor relative to securing substitute counsel for the accused.

Another such situation was noted in Kelly v. Peyton, 420 F.2d 912 (4th Cir. 1969). In that case the Court concluded that

> a lawyer representing parties whose interests are conflicting cannot act with that degree of loyalty which (is expected of counsel in criminal cases) or if he is employed by the prosecuting soverign and charted with duties relating to the investigation or prosecution of that case. Id., at 914 (emphasis as in original).

Later in United States v. Schell, 775 F.2d 559 (4th Cir. 1985), cert. denied, 475 U.S. 1098 (1986), the Court held that a Prosecutor's participation in a criminal matter is a violation of due process carrying a presumption of prejudice if the prosecutor previously represented the defendant with respect to the same case.

The facts in Schell disclosed that a codefendant, Freda Wilson, initially sought counsel's advice relative to a Grand Jury subpoena served on her son and, thereafter, requested counsel's representation following service on her of a related subpoena. Counsel then accepted employment with the Office of the United States Attorney, disclosed his prior relationship with Wilson and others, and was instructed "not to participate in the government's case" against them, albeit he did appear before the Grand Jury "in his capacity as Assistant United States Attorney" which later indicted them. Id., at 563.

Claiming that counsel had been an

"unauthorized person to appear before the grand jury", Wilson sought dismissal of the indictment. However, she testified before the district court that she imparted no confidential information to counsel and, in fact, "stated that her primary point of discussion...dealt with her concern that her son was being harassed by the authorities." Ibid. The district court ruled "that there was no impropriety on (counsel's) part or on the part of the United States Attorney's Office" and denied the motion brought by Wilson and others. 775 F.2d, at 564.

Following their convictions a direct review proceeding ensued. The Fourth Circuit reversed Wilson's conviction concluding that

> the attorney-client relationship is severely compromised, if not destroyed, when, after representing a client, a lawyer joins the criminal prosecution of that client with respect to the identical matter about which the attorney counseled the client. Such switching of sides is fundamentally unfair and inherently prejudicial. Without question, the client's right to a fair trial, secured by the due process clauses of the fifth and fourteenth amendments, is compromised under these circumstances. 775 F.2d, at 565 (emphasis as in original).

The Schell Court went on to hold that "due process is violated when an attorney represents a client and then participates in the prosecution of that client with respect to the same matter." 775 F.2d, at

566 (emphasis added).

In his "Commonwealth's Statement for the Record" Mr. Camblos, under oath, admits that Mr. Coffin "did consult with me several times with regard to procedural matters and how to ask questions of the witnesses" during the course of the October 29, 1985 proceedings. Mr. Camblos went on to state in the same document that his involvement with Mr. Coffin, "had not even come to my mind prior to the filing of the Motion to Vacate." Similarly at the time of the November 3, 1993 hearing, pleadings supporting the motions to vacate and for reconsideration reflect, Mr. Coffin was then unaware of Mr. Camblos' political position. And, of course, Mr. Treakle was wholly unaware of the prior relationship between the two.

The conclusions of the courts below could not be more inimical to the holdings of the Fourth and Seventh Circuits. The post-trial motions were fully briefed. The circuit judge wrote in the lower margin of the Motion For Reconsideration, "11-23-93 Motion denied(,) Paul M. Peatross, Jr.(,) Judge". Upon review the Court of Appeals of Virginia declined to consider the constitutional principle presented here and in those motions by invoking the contemporaneous objection rule, Slip Op., at 2, and, of course, the Supreme Court of Virginia refused the petition thereafter presented in its entirety.

The presence of Mr. Camblos in the courtroom during Mr. Coffin's probation violation hearing on November 3, 1993, although noted in Mr. Coffin's petition for appeal to the Court of Appeals

of Virginia, was never the issue for, arguably, that proceeding was different from the October 29, 1985 hearing for which Mr. Camblos was appointed to assist Mr. Coffin.[1] The attorney-client relationship between the two was rekindled, however, in the post-trial pleadings focusing primarily on Dr. Delawter's recordkeeping which had not theretofore been made available to Mr. Coffin or any of his counsel. It was this fact which was, and remains, the factor which generated Mr. Coffin's constitutional claims and, because the facts underlying both issues were not available to counsel earlier, the ends of justice and due process dictate that the claim should have been heard. Amadeo v. Zant, 486 U.S. 214 (1988). This is particularly true where, as argued under Question II, infra, officials concealed exculpatory facts material to the underlying case and which facts did not surface prior to - or even at the time of - the probation violation hearing, albeit those facts together with the constitutional issue here presented, were raised by the filing of timely post-trial motions.

Mr. Coffin does not suggest that, upon the filing of those motions, Mr. Camblos' role should have - or even could have - reverted to his prior role of assistance to Mr. Coffin per se; rather, given the

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[1] As noted in Mr. Coffin's subsequent petition for appeal to the Supreme Court of Virginia, Mr. Coffin's observance of Mr. Camblos' presence in the courtroom was particularly unnecessary given the latter's prosecution of Mr. Coffin throughout the post-trial phase and subsequent direct review proceedings.

critical nature of the information finally brought to light relative to the unreliability of Dr. Delawter's recordkeeping Mr. Camblos, de minimus, should have (a) recognized its significance upon reflection and his acknowledged review (by affidavit) of the October 29, 1985 transcript following the filing of Mr. Coffin's post-trial motions and, thus, (b) concurred in Mr. Coffin's request for a hearing before the trial court. Alternatively, a special prosecutor might have been appointed.

Concomitantly, rather than summarily denying Mr. Coffin's post-trial motions on November 23, 1993, due process mandates that the trial court was duty-bound to hold a hearing upon the allegations advanced that authorities withheld exculpatory evidence bearing directly on the veracity of Dr. Delawter's records and his resultant testimony which, as demonstrated in Question II, infra, was the entire basis of the Commonwealth's case, as well as Mr. Camblos' involvement with Mr. Coffin during his preliminary hearing which, in the context of this matter, proved to be a particularly critical stage of the proceedings and the adverse position Mr. Camblos thereafter assumed which created a conflict of interest.

The facts of the case sub judice highlight a conflict in principle with this Court's decision in Wood v. Georgia, 450 U.S. 261 (1981). In Wood the Court concluded that, after revocation of the defendants' probation upon their failure to pay fines imposed following their convictions for distributing obscene material, the trial court had a duty to make further inquiry where it appeared that a conflict

arose between defense counsel and the interests of his clients whose probationary terms were revoked. Similar to the facts here presented, the Court observed that none of the defendants voiced a timely contemporaneous objection to the fines the trial court imposed upon them. However the Court also noted that, post trial, defense counsel's interests may have shifted to yet another client whose agenda seemed to include making a test case at the expense of counsel's original clients. The Court concluded that the trial court had a duty to satisfy itself that no conflict existed when the possibility arose. As the Court said, "the record does demonstrate that the possibility of a conflict of interest was sufficiently apparent to impose upon the court a duty to inquire further." 450 U.S., at 272 (emphasis as in original).

The record below in the case at bar further reflects that, instead of even recusing himself, Mr. Camblos assumed a position adverse to Mr. Coffin and which, indeed, persisted throughout the direct review proceedings before both the Court of Appeals of Virginia and Mr. Coffin's subsequent petition for appeal to the Supreme Court of Virginia. Mr. Coffin's substantive rights under the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution, not to mention ethical considerations, were ignored. Plenary consideration by this Court is essential.

II.

A criminal defendant has a right to be heard in court following a probation violation hearing where he then first learns of the existence of exculpatory evidence possessed by a state administrative agency at the time he tendered an Alford plea to the indictment underlying his conviction upon which the probation order is revoked.

Following the October 29, 1985 preliminary hearing, certification of the Commonwealth's allegation to a grand jury and his resulting indictment, Mr. Coffin retained attorney Colin Guy to represent him. Albemarle County Circuit Court records reflect that Mr. Guy perfected timely discovery motions seeking, inter alia, any exculpatory material possessed by the Commonwealth under this Court's decisions in Giglio v. United States, 405 U.S. 150 (1972), and United States v. Bagley, 473 U.S. 667 (1985).

As the scheduled trial date of March 31, 1986 approached, counsel's discovery requests revealed that the Commonwealth's case consisted of Dr. Delawter's testimony; the testimony of pharmacist Don Garver who filled the prescription; the prescription itself; and, a report from the Virginia Bureau of Forensic Science reflecting that, in the opinion of the examiner, the first 4 of the number 44 was made from two different inks - all of which evidence was identical to that deduced during the preliminary hearing and, other than the testimony of Dr. Delawter, none of which was incriminating.

Yet counsel observed that the Commonwealth, then represented by an entirely different staff from that in 1993, had invoked its right to a trial by jury and he viewed the ultimate contest coming down to a dispute in testimony between Dr. Delawter and Mr. Coffin with the jury more likely resolving in Dr. Delawter's favor given the general perception that physicians are reliable and less prone to making mistakes. Thus, counsel advised Mr. Coffin to tender a plea in accordance with North Carolina v. Alford, 400 U.S. 25 (1970), which eliminated the risk, under Virginia law, of the jury's recommendation of sentence.

The Virginia Board of Medicine ("the Board") is a state regulatory agency empowered with duties which include the licensure and supervision of healthcare professionals who practice in the Commonwealth. By both policy and practice the Board informs local law enforcement agencies upon the commencement of its investigations of malpractice or malfeasance of any healthcare professional. Sanctions imposed by the Board upon any such conclusive findings following appropriate administrative procedures, are thence made available to the public upon request.

In the case of Dr. Delawter public records reflect that the Board's investigation of his practice commenced in November of 1985, included a review of his records for two years preceding the commencement of the investigation, and a continued monitoring of his practice, all of which culminated in the imposition of sanctions upon him following administrative procedures on June 22, 1989 for an

"indefinite period" of time. Further evidence does exist that, consistent with its usual policy and practice, Albemarle County police were formally notified by the Board of the commencement of the investigation in January, 1986.

In addressing this claim the Court of Appeals of Virginia concluded that, by pleading guilty, Mr. Coffin had waived all non-jurisdictional defenses and refused to vacate the judgment. Slip Op., at 3. But balanced against the objective of finality in litigation is an accused's rights to due process and equal protection of the laws. A valid plea under Alford subsumes that, "the plea represents...an intelligent choice among...alternative courses of action(.)" 400 U.S., at 31 (emphasis added). The elemental necessity of "intelligence" cannot be satisfied however where, as here, the state has withheld exculpatory evidence bearing directly on the credibility of its principle witness, Giglio, supra, 405 U.S., at 155, notwithstanding the fact that it is settled law that the duty to disclose continues even after the end of the proceedings. Mooney v. Holohan, 294 U.S. 103, 108 (1935). Under the facts of this matter, Dr. Delawter's testimony alone was pivotal to the Commonwealth's case for, standing alone, the remainder of the Commonwealth's evidence was, in and of itself, not incriminating. Physicians, after all, routinely alter quantities and doseages of medicines prescribed to patients. Thus, a reasonable likelihood exists that timely disclosure of the Board's investigation would undoubtedly have affected counsel's advice and Mr. Coffin's decision to plead guilty and, moreover, could have affected the judgment of a jury. United States v. Bagley, 473 U.S. 667, 678 (1985); Miller v. Pate,

386 U.S. 1 (1967); and, Napue v. Illinois, 360 U.S. 264 (1959). Due Process mandates that the trial court should have granted Mr. Coffin's request for a hearing when this information first surfaced following the revocation of his probation on November 3, 1993. This is especially true since newly-discovered evidence directed at guilt or innocence is not a ground for consideration in collateral proceedings, Townsend v. Sain, 372 U.S. 293, 317 (1963), and the information bore directly on the heart of the Commonwealth's case for which Mr. Camblos was appointed to assist Mr. Coffin during the preliminary hearing.

Notwithstanding the foregoing, the disparate positions taken by the Commonwealth are untenable as a matter of law. On the one hand Dr. Delawter's "failure to maintain accurate records" is sufficient to impose sanctions upon him following an extensive and intensive investigation which specifically included the period during which the prescription in issue was written, but on the other his recordkeeping is reliable enough to precipitate the incarceration of one of its citizens. Quite apart from being untenable, these disparate positions do undermine confidence in the outcome of Mr. Coffin's criminal case, Strickland, supra, 466 U.S., at 696, together with the concept of fundamental fairness and the command of equal protection of the laws. The Court should remand this case to the state courts with instructions to afford Mr. Coffin an opportunity to present and establish all of the facts material to his due process claim during a hearing. The expense and judicial resources involved in such a procedure pale in comparison to Mr. Coffin's right to due process of

the law.

III.

> A criminal defendant is entitled to specific performance of an agreement where part of the inducement to plead guilty includes the prosecutor's promise to insure that the defendant's probation, imposed in an earlier proceeding, will not be affected by the subsequent plea.

Although a factual dispute exists with respect to the issue here presented and Mr. Coffin's recognizes that this Court rarely grants certiorari to review a lower court decision which turns on the particular facts involved, Mr. Coffin believes that the applicable standard was "grossly misapplied" thus warranting the Court's consideration. Mobil Oil Corp. v. FDC, 417 U.S. 283, 310 (1974).

In 1993 Mr. Coffin tendered an Alford plea upon two violations of Section 18.2-258.1(A)(i), Code of Virginia (1993). Specifically, the Commonwealth alleged that, prior to a surgical procedure involving the removal of two herniated cervical disks, Mr. Coffin obtained identical prescription medications from different physicians without disclosing his actions to the doctors. Mr. Coffin's plea was to an indictment handed down by a Multi-Jurisdictional Grand Jury and prosecuted by Special Prosecutor Learned Barry.

A plea agreement was reached between defense counsel, prosecutor Barry, and Mr. Coffin wherein, inter alia, Mr. Coffin agreed to pay a fine of $2,000.00. In return, the Commonwealth agreed

not to seek a term of confinement as a result of Mr. Coffin's plea. That portion of the agreement was reduced to writing, signed by the parties, and approved by the Circuit Court of the City of Richmond, Division II.

Subsequent thereto, of course, Mr. Camblos executed a request for a show cause order before the Circuit Court of Albemarle County seeking revocation of Mr. Coffin's probation. As heretofore stated, on November 3, 1993 Mr. Coffin's probation was revoked and the three year sentence, imposed on July 9, 1986, was activated.

In addressing this claim, the Court of Appeals of Virginia concluded that, "(t) he record is devoid of any promise regarding (Mr. Coffin's) probation." Slip Op., at 4. It is this factual finding upon which a genuine and material dispute exists.

The transcript of Mr. Coffin's probation violation hearing reveals, at 28, that before the 1993 plea hearing Mr. Coffin informed his counsel that he would tender no plea to the Multi-Jurisdictional Grand Jury's Indictment if it was going to "jeopardize the probation." The evidence further deduced that counsel spoke with Special Prosecutor Barry and elicited a promise that, "if (Mr. Coffin) would go ahead and enter the plea" there would be no probation violation; indeed, "the matter would be resolved." Ibid. The Commonwealth, on November 3, 1993, advanced no evidence to the contrary and, thus, Mr. Coffin's evidence was wholly uncontradicted.

In Santobello v. New York, 404 U.S. 257 (1971), this Court held that, "when a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled." 404 U.S., at 262 (emphasis added).

The facts before the trial court inarguably reflect that Mr. Coffin refused to tender any plea to the Multi-Jurisdictional Grand Jury's indictment if it would jeopardize his Albemarle County probation and that Mr. Coffin acquiesced to the agreement and plea only after securing a promise from Special Prosecutor Barry insuring that his probation would be unaffected. Thus, it is inescapable that this promise was "part of the inducement or consideration" incidental to the plea.

Quite apart from the factual dispute above noted, the decision of the Court of Appeals of Virginia is in direct conflict as a matter of law with United States v. Connor, 930 F.2d 1073 (4th Cir. 1991), where the Court held that as the party alleging the breach of such an agreement, the defendant bears the burden of proving the prosecutor's breach by a preponderance of the evidence. Because the Commonwealth wholly failed to tender any evidence in contravention of the breach alleged by Mr. Coffin, clearly Mr. Coffin has satisfied his burden of proof.

Consequently, although a factual dispute here exists a greater imperative between the Court of Appeals of Virginia and the United States Court of Appeals for the Fourth Circuit relative to an

important and established rule of law warrants plenary consideration by this Court given the constitutional and evidentiary principles in conflict between the courts below.

CONCLUSION

For the various foregoing reasons, this petition for certiorari should be granted. The petitioner reiterates that, although there is a dispute relative to a factual finding of the Court of Appeals of Virginia with respect to Question 3 presented herein, the greater issue is the appropriate evidentiary standard applicable in such cases which remains a question not previously addressed by this Court.

Respectfully Submitted,

Dexter D. Coffin, III
1745 Jumpers Run
Charlottesville, Virginia 22911
(804) 973-1232

December 11, 1995

VIRGINIA:

In the Court of Appeals of Virginia on Wednesday the 7th day of September, 1994.

Dexter Drake Coffin, III,
Appellant,

against

Record No. 2432-93-2
Circuit Court No. 6544

Commonwealth of Virginia,
Appellee.

From the Circuit Court of Albemarle County
Before Chief Judge Moon, Retired Judges Hodges and Penn*

This petition for appeal is denied for the following reasons:

I. Appellant argues that the trial court erred by refusing to vacate its judgment of November 8, 1993 when it was informed of the Commonwealth's Attorney's conflict of interest.

Appellant was charged in 1985 with altering a prescription in violation of Code § 18.2-258.1. At the preliminary hearing, appellant elected to represent himself pro se, and the court asked Mr. Camblos to assist appellant in some capacity. The transcript does not reflect that Mr. Camblos argued before the court, questioned witnesses, or had any substantive relationship with appellant beyond explaining court procedure. On the contrary, the court made it clear that despite being assisted by Mr. Camblos, appellant was representing himself. Subsequently, appellant pled guilty to the charge, and was sentenced to three years in the state penitentiary, suspended upon the successful completion of five years

probation. Probation was to begin running after appellant's release from confinement for other convictions, which occurred on August 4, 1989.

In April, 1993, appellant pled guilty to two charges of subterfuge by receiving multiple prescriptions for painkillers from multiple physicians, in violation of Code § 18.2-258.1. These convictions were a violation of appellant's probation for the 1985 offense, and his probation officer sought a "show cause" hearing in Albemarle County. At the probation violation hearing, the Commonwealth was represented by Mr. Childress, an assistant prosecutor from the Albemarle County Commonwealth's Attorney's Office. By this time, however, Mr. Camblos, the attorney who assisted appellant in 1985, was now Albemarle County's Commonwealth's Attorney. Mr. Camblos and appellant greeted each other before court, and Mr. Camblos remained in the court during the hearing. At no time does the record reflect that Mr. Camblos in any way participated in the hearing, and appellant did not object to his presence.

The contemporaneous objection rule requires that an objection be stated at the time of the ruling, along with the grounds for the objection. Rule 5A.18. "Failure to make a timely defense has been held a waiver." Evans & Smith v. Commonwealth, 226 Va. 292, 298, 308 S.E.2d 126, 130 (1983); Brooks v. Peyton, 210 Va. 318, 171 S.E.2d 243 (1969). Appellant did not object to Mr. Camblos's presence until after appellant had been sentenced to three years in prison, at which time he filed his motion for reconsideration. Appellant's objections was untimely. The Court, therefore, will not consider this issue.

II. Appellant also argues that the judgment in this case is constitutionally infirm as a result of administrative proceedings the Commonwealth undertook against the

physician who testified against appellant in 1985. At appellant's 1985 preliminary hearing, the principal witness against appellant was Dr. DeLawter, who had written the altered prescription. Three years after appellant's conviction, Dr. DeLawter was placed on probation by the Virginia Board of Medicine for personal drug use and failure to maintain accurate records. Appellant now argues that the charges against the doctor make appellant's conviction unreliable. There is no evidence presented to support this charge.

"When an accused enters a voluntary and intelligent plea of guilty to an offense, he waives all defenses except those jurisdictional." Savino v. Commonwealth, 239 Va. 534, 538, 391 S.E.2d 276, 278, cert. denied, 498 U.S. 881 (1990). Accordingly, "there is nothing to appeal"; Id. at 539, 391 S.E.2d at 278 (quoting Peyton v. King, 210 Va. 194, 196-97, 169 S.E.2d 569, 571 (1969)); and the judgment will not be vacated.

III. Appellant asserts that the Commonwealth breached the 1993 plea agreement when it sought to revoke appellant's probation for the 1985 violation. Neither the plea agreement nor the circuit court's order signed on April 5, 1993 make any mention of incarceration. Instead the plea agreement recommends that the court impose a fine and probation. The court adopted the recommendation. While there was an implicit understanding that the Commonwealth would not seek incarceration with regards to the April, 1993 conviction, there was no such implication regarding his probationary status.

Appellant cites United States v. Harvey, 791 F.2d 294 (4th Cir. 1986), and Santobello v. New York, 404 U.S. 257 (1971), to justify his belief that the Commonwealth has breached the plea agreement. These cases are not on

point. In Harvey there was an explicit statement in the plea agreement stating that the government would refrain from further prosecution of drug offenses in the Eastern District of Virginia. The Fourth Circuit interpreted the plea agreement to bar prosecution by the government of similar contemporaneous offenses in any district in the United States. Harvey, 791 F.2d at 303. Likewise, in Santobello the prosecution explicitly promised to make no recommendation as to sentence. The prosecution later broke this promise and sought the maximum penalty. In reversing the conviction, the Supreme Court state that "when a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled." Santobello, 404 U.S. at 262 (emphasis added). In the instant case, the Commonwealth is not seeking further prosecution of similar, contemporaneous offenses. Although the 1985 and 1993 charges may be similar, they are separate events and in no way related. Furthermore, the Commonwealth did not promise to refrain from seeking probation revocation for an offense for which appellant had already been convicted. The record is devoid of any promise regarding appellant's probation.

"It is beyond question that '[a] court which has ordered a suspension of sentence undoubtedly has the power to revoke it when the defendant ha failed to comply with the conditions of this suspension.'" Russnak v. Commonwealth, 10 Va. App. 317 321, 392 S.E.2d 491, 493 (1990) (quoting Griffin v. Cunningham, 205 Va. 349, 354, 136 S.E.2d 840, 844 (1964)). Appellant failed to comply with the conditions of probation when he was convicted for prescription fraud in 1993. Revocation of appellant's probation "will not be reversed unless there is a clear showing of abuse of discretion." Davis v. Commonwealth, 12 Va. App. 81, 86, 402 S.E.2d 684, 687 (1991). There

was no abuse of discretion in revoking appellant's probation, and the decision will not be disturbed.

IV. Appellant contends the trial court failed to articulate the reasons upon which it relied in revoking the appellant's probation, and therefore, the November 8, 1993 order should be vacated. "The probationer is entitled to...a written statement by the factfinder as to the evidence relied on and the reasons for revoking probation." Black v. Romano, 471 U.S. 606, 612 (1985) (citing and applying Gagnon v. Scarpelli, 411 U.S. 778, 786 (1973), to state court proceedings). This notwithstanding, "a transcribed oral finding can serve as a 'written statement' for due process purposes when the transcript and record compiled before the trial judge enables the reviewing court to determine the basis of the trial court's decision." United States v. Copley, 978 F.2d 829, 831 (4th Cir. 1992). See also United States v. Barth, 899 F.2d 199, 201-02 (2nd Cir. 1990), cert. denied, 498 U.S. 1083 (1991).

In the instant case, a transcript of the probation violation is available in which appellant's counsel concedes that appellant's guilty plea in Richmond "may be a technical violation" of the terms of appellant's probation. He subsequently agrees with the judge's finding that a probation violation occurred when appellant was convicted of the felony charges in Richmond. Appellant was present at the hearing, was represented by counsel, and adequately informed of the reasons for his probation revocation. Accordingly, the November 8, 1993 probation revocation order will not be vacated.

V. Finally, the appellant argues that his reliance upon his former counsel's advice vitiates his Alford plea in Richmond; consequently, the probation revocation is constitutionally infirm. Appellant is attempting to assert and ineffective assistance of counsel claim against the

attorney who represented him in the Richmond proceedings. All the cases cited on appellant's behalf reflect that the proper forum for such a challenge is a habeas appeal. See Myers v. Stephenson, 781 F.2d 1036 (4th Cir. 1986); Manley v. United States, 588 F.2d 79 (4th Cir. 1978). Appellant's claim against his attorney for actions in a collateral proceeding may not be considered in this appeal of his probation revocation. See Morse v. Commonwealth, 6 Va. App. 466, 369 S.E.2d 863 (1988).

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*Retired Judges William H. Hodges and Carleton Penn took part in the consideration of this case by designation pursuant to Code § 17-116.01.

A Copy,
Teste:

Richard R. James, Clerk
By: (s)_____
Deputy Clerk

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Friday the 22nd day of September, 1995.

Dexter Drake Coffin, III,
Appellant,

against

Commonwealth of Virginia,
Appellee.

Record No. 950952
Court of Appeals No. 2432-93-2

From the Court of Appeals of Virginia

Upon review of the record in this case and consideration of the argument submitted in support of the granting of an appeal, the Court refuses the petition for appeal. Justice Koontz took no part in the consideration of this case.

A Copy,
Teste:

David B. Beach, Clerk

By: (s)_____
Deputy Clerk

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Tuesday the 24th day of October, 1995.

Dexter Drake Coffin, III,
Appellant,

against

Commonwealth of Virginia,
Appellee.

Record No. 950952
Court of Appeals No. 2432-93-2

ORDER DEFERRING ISSUANCE OF MANDATE

Upon consideration of the motion of Dexter D. Coffin, III, in proper person, it is ordered that issuance of the mandate entered herein September 22, 1995 be and the same hereby is deferred, to and including the 21st day of December, 1995, on the expiration of which time the same may be issued, unless the case has been before that time docketed in the Supreme Court of the United States, in which event issuance of the mandate shall be deferred until the final determination of the case by that Court

A Copy,
Teste:

(s)_____
Clerk